

CITY OF TIGARD, OREGON

ORDINANCE NO. 04-06

An Ordinance Granting a Non-Exclusive Gas Utility Franchise to NW Natural and Fixing Terms, Conditions and Compensation of Such Utility and Repealing All Ordinances and Parts of Ordinances That Conflict Herewith, and Declaring an Emergency.

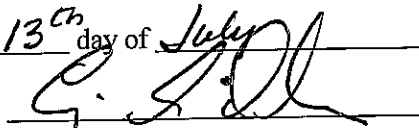
WHEREAS, the ten-year franchise for the operation o a gas utility within the City of Tigard is now before the City Council for renewal, the Council believes that the franchise should be renewed under the terms and conditions set forth in Exhibit A attached to this ordinance.

NOW, THEREFORE, THE CITY OF TIGARD ORDAINS AS FOLLOWS:

- SECTION 1: A new, ten-year franchise for NW Natural is approved, including all of the terms and conditions as substantially set forth in the agreement attached as Exhibit A to this ordinance.
- SECTION 2: The Mayor is authorized and directed to sign the agreement attached to this ordinance as Exhibit A on behalf of the Council.
- SECTION 3: The City Council determines that the fee imposed by this franchise is not a tax subject to the limitations of Article XI, Section 11 (b) of the Oregon Constitution.
- SECTION 4: This ordinance shall replace and repeal the prior franchise with NW Natural, Ordinance No. 93-29, adopted on October 26, 1993. In addition, it is agreed by the City and NW Natural that the terms of Ordinance No. 93-29 remained in effect from October 26, 2003 to the effective date of this ordinance.
- SECTION 5: Because of the need to maintain stable gas service to citizens of Tigard and a stable flow of revenue from franchise fees, an emergency is declared and this ordinance shall take effect upon its passage.
- PASSED: By unanimous vote of all Council members present after being read by number and title only, this 13<sup>th</sup> day of July, 2004.

  
Jane McGarvin, Deputy City Recorder

APPROVED: By Tigard City Council this 13<sup>th</sup> day of July, 2004.

  
Craig Dirksen, Mayor

Approved as to form:

  
City Attorney

7/13/04  
Date

## **Exhibit A**

### **NATURAL GAS UTILITY FRANCHISE AGREEMENT**

A nonexclusive, ten (10) year franchise between the City of Tigard and Northwest Natural to conduct a natural gas utility business within the City of Tigard.

#### **SECTION 1. GRANT AND ACCEPTANCE OF FRANCHISE**

The City of Tigard (herein referred to as "City") grants to Northwest Natural (herein referred to as "Grantee"), subject to the City codes, ordinances, regulations, and terms of this agreement, the privilege to use the rights of way of the City of Tigard the purpose of furnishing natural gas to customers within the City of Tigard. This grant includes the right to construct, place, replace, reconstruct, lay, maintain, and operate lines, fixtures, facilities, appliances, structures and other devices including, but not limited to, electronic and mechanical devices customarily associated with Grantee's function and purpose of serving as a natural gas utility.

All facilities of Grantee currently located within rights of way in the City are covered by this agreement and deemed lawfully placed in their current locations. The City may require relocation as further specified in this agreement.

Grantee accepts the grant of the franchise and agrees to comply with Tigard Municipal Code, the ordinance granting the franchise, and all other applicable laws, ordinances, and regulations.

#### **SECTION 2. FRANCHISE FEE**

- a. Grantee shall pay an annual franchise fee in the amount of five percent (5%) of gross revenues received from customers within the City, less net uncollectibles from such revenues. Gross revenues are revenues received from utility operations within the City, less net uncollectibles. Gross revenues shall include revenues from the use, rental, or lease of the Grantee's operating facilities other than residential-type space and water heating equipment. Gross revenues shall not include proceeds from the sale of bonds, mortgage or other evidence of indebtedness, securities or stocks, or sales at wholesale by one utility to another utility when the utility purchasing the service is not the ultimate customer.
- b. The franchise fee is compensation for the use of rights of way. The franchise fee is separate and distinct from any other legally authorized federal, state or local taxes or fees, and Grantee shall pay any such fees or taxes to the City when due. Payment of such fees shall not affect the franchise fee unless the fee or tax is imposed by the City solely on Grantee and not on any class or persons. If the City imposes a fee or tax solely on Grantee and not on any class or persons, then the

amount of such fee or tax paid shall be a credit towards the amount of franchise fee due on the next regularly scheduled payment dates.

- c. The franchise fee is not subject to the property tax limitations of Article XI, sections 11(b) and 11(19) of the Oregon Constitution and is not a fee imposed on property or property owners by fact of ownership.
- d. The franchise fee shall be payable semi-annually on or before March 15 for the six month period ended December 31, and September 15 for the six month period ended June 30. The Grantee shall pay interest at the rate of one percent (1%) per month for any payment made after the due date.
- e. Upon thirty (30) days written notice by either party to the other, the provisions of section 2(a) of this agreement may be modified. The requested notice of any requested modification may be given only after the sixth year of the franchise term, i.e., between five and six years after the Grantee signs this Agreement. If the parties are unable to agree to a modification of section 2(a) of this Agreement or to a continuance of the same provision within ninety (90) days of receipt of a requested modification, or such longer time as may be agreed to by the parties, this Agreement shall terminate. Any increase in the franchise fee shall not go into effect sooner than thirty (30) days after the parties reach agreement on an increase.
- f. The obligation to pay the franchise fee imposed by this section shall survive expiration of this agreement as long as the Grantee continues to exercise the rights granted in Section 1. In the event this agreement is terminated before expiration, within 90 days of the termination date Grantee shall pay the City the franchise fee due based on gross revenues through the date of termination.
- g. The parties recognize that the City has the authority to impose a privilege tax for the use of public rights of way and the City may structure the privilege tax so that it is in addition to any other taxes or fees, including the franchise fee.

### **SECTION 3.           TERM**

The rights, privileges and franchise hereby granted shall commence when signed by both parties and continue to be in full force for a period of ten (10) years from the date this agreement becomes effective. This agreement shall be subject to any and all State or Federal laws and regulations.

### **SECTION 4.           TRANSFER OR ASSIGNMENT**

- a. Transfer as a regulated service. Grantee shall not transfer or assign this franchise to any entity that is not authorized by the Oregon Public Utilities Commission to

provide natural gas utility service in the City. A transfer of ownership or control of a majority interest in the Grantee shall constitute a transfer of the franchise. If the franchise is assigned or transferred, the assignee or transferee shall become responsible for all facilities of the Grantee at the time of transfer. The transferee or assignee will be bound by the franchise agreement and all applicable City Code and regulations as they exist at the time of transfer. A transfer or assignment of a franchise does not extend the term of the franchise.

- b. Transfer as a non-regulated service. If transfer of ownership or control of Grantee is not subject to the approval of the Oregon Public Utility Commission or a successor agency, Grantee shall not transfer or assign this franchise to any other party without the express written consent of the City. A transfer of ownership or control of a majority interest in the Grantee shall constitute a transfer of the franchise.

If the franchise is assigned or transferred, the assignee or transferee shall become responsible for all facilities of the Grantee at the time of transfer. The City shall allow the transfer or assignment if a transfer fee in a reasonable amount determined by resolution has been paid, the transferee or assignee meets all requirements imposed on franchisees, and the transferee or assignee agrees in writing to be bound by the franchise agreement and all applicable City Code and regulations as they exist at the time of transfer. A transfer or assignment of a franchise does not extend the term of the franchise.

## **SECTION 5. SERVICE TO CITY**

If City contracts for the use of Grantee's services, Grantee agrees to charge its most favorable rate offered within Oregon for a similar volume of service.

## **SECTION 6. INSURANCE**

- a. Grantee shall provide and keep in force public liability insurance, with a thirty (30) day cancellation clause, with a combined single limit of three (3) million dollars, which shall be evidenced by a certificate of insurance filed with the City Recorder. The City shall be named as an additional insured on the policy to the extent of Grantee's indemnity obligations under this franchise agreement. The insurance shall indemnify and hold the City harmless against liability or damage which may arise or occur from any claim resulting from the Grantee's operation under this agreement. In addition, the policy shall provide for the defense of the City for any such claims.
- b. In lieu of the third-party public liability insurance policy required by subsection a. of this section, Grantee may provide and keep in force self-insurance in an amount at least equal to the limits identified in the preceding paragraph. The Grantee shall

provide proof of self-insurance to the City before this agreement shall take effect and upon request thereafter.

## **SECTION 7. INDEMNIFICATION**

Grantee shall defend, indemnify and hold harmless, the City and its officers, employees, agents and representatives from and against any and all damages, losses, and expenses, including reasonable attorney fees and costs of any and all claims, actions and suits or defense, arising out of, resulting from, or alleged to arise out of or result from the negligent, careless, or wrongful acts, omissions, failure to act, or other misconduct of the Grantee or its affiliates, officers, employees, agents, contractors, subcontractors, or lessees in the construction, operation, maintenance, repair, or removal of its equipment and facilities, and in providing or offering service through the facilities, whether such acts or omissions are authorized, allowed, or prohibited by this agreement or by Tigard Municipal Code.

## **SECTION 8. DAMAGE TO GRANTEE'S FACILITIES**

The City shall not be liable for any damage to or loss of any facility as a result or in connection with any work by or for the City or for any consequential damages or losses resulting from such work unless the damage or loss is the direct and proximate result of willful, intentionally tortious, negligent, or malicious acts by the City.

## **SECTION 9. PERFORMANCE SECURITY/PERMIT DEPOSIT**

To cover the fees and deposits for the permits required under Section 13 of this Agreement and to provide quality assurances for routine work, Grantee shall deposit with City an initial amount of \$5,000 within 15 days of the effective date of this agreement. The City shall use the deposit in each year of this Agreement only to pay for the fees and other payments required to obtain improvement permits or to correct or repair routine work of grantee not repaired to the City's satisfaction. At the end of each calendar year, the City shall provide an accounting to Grantee of the amounts used from the deposit and shall credit Grantee with any funds remaining in the deposit account. Beginning on January 31, 2006 and on each January 31 thereafter, Grantee shall deposit any additional sum to make the total deposit equal to the total amount of fees and deposits for permits obtained by Grantee in the previous calendar year plus any amounts expended by the City to correct or repair routine work of the Grantee not repaired to the City's satisfaction in the previous calendar year.

If at any time during the life of this Agreement the Grantee shall fail to comply with the material terms of a construction permit or to timely pay labor or material claims, the City shall, at its discretion, have the right to require Grantee to provide a performance bond or other surety acceptable to the City in an amount equal to at least 100% of the estimated

costs of the new facilities prior to installing additional new facilities in any right of way. If invoked, this requirement shall continue for at least one year from the date of the failure to comply with the material terms of a construction permit or to timely pay labor or material claims. Any surety required shall remain in force until 60 days after substantial completion of the relevant project, including restoration of public rights of way and other property, as determined by the City. The surety shall guarantee timely completion, construction in compliance with applicable plans, permits, codes and standards, proper location, restoration of public rights of way and other property, and timely payment and satisfaction of all claims, demands or liens for labor, material or services.

## **SECTION 10. NOTICE**

All notices and approvals required under this agreement shall be in writing. Grantee's contact for administration of this Agreement is listed below. Grantee shall provide the City with the name(s), position(s) and phone number(s) for contact with construction related questions and comments.

Grantee Administrative Contact:

NW Natural  
220 NW Second Avenue  
Portland, OR 97209  
Attn: Franchise Manager

Notices to the City shall be directed to:

City Engineer, City of Tigard  
13125 SW Hall Blvd.  
Tigard, OR 97223  
503) 639-4171

## **SECTION 11. AUDIT**

- a. Within ten (10) business days of a written request from the City, Grantee shall furnish the City:
  1. Information sufficient to demonstrate that Grantee is in compliance with this agreement.
  2. Access to all books, records, maps and other documents maintained by Grantee with respect to its facilities in City rights of way so that the City may perform an audit. Grantee shall provide access to City within the Portland, Oregon metropolitan area.

- b. If the City's audit shows that Grantee has underpaid the franchisee fee by five percent (5%) or more in any one year, Grantee shall reimburse City for the cost of the audit, and in addition to paying any underpayment, pay interest specified in this agreement from the original due date. All payments shall be made within sixty (60) days of delivery to Grantee of the audit results.

## **SECTION 12. INTERFERENCE WITH RIGHTS OF WAY**

Grantee shall locate and maintain all its facilities so that they do not unreasonably interfere with the use of rights of way. Grantee agrees to complete all construction in rights of way so as to minimize disruption of the right of way and utility service and without interfering with other public and private property. Grantee agrees that it will not conduct any work in a right of way during a moratorium on right of way work, except as permitted by the City in case of an emergency.

## **SECTION 13. CONSTRUCTION PERMIT**

Except when work is necessary during an emergency or to remedy an immediate risk of harm to persons or property, Grantee shall obtain a construction permit prior to engaging in any construction or installation activities within a City right of way and shall comply with all permit terms. When Grantee has engaged in work of an emergency nature or to remedy an immediate risk of harm to persons or property, Grantee shall apply for and obtain a permit for this work within fourteen days of the completion of such work. Grantee shall designate a Construction Manager who can respond to any requests by the City and order changes or modifications as necessary for each project. The City shall promptly respond to Grantee's requests for permits.

## **SECTION 14. FACILITIES**

Grantee shall install, construct, operate and maintain its facilities in City rights of way in accordance with all applicable federal, state and local statutes, codes, ordinances, rules and regulations. Grantee agrees not to place any of its facilities on or in any City trench, conduit, box or similar equipment without a separate agreement from the City authorizing such placement.

## **SECTION 15. AS BUILT DRAWINGS**

Subject to the confidentiality limitations of this section, Grantee shall provide City with available maps of the location of its facilities and operational data requested by the City. The Grantee shall also provide as-built plans for those portions of the system that are added to or modified during the year.

These records are submitted in confidence, and the City will keep those records in confidence and not allow others to view or copy them. The City agrees to keep the documents confidential and to take the position that they are exempt from public disclosure. The City shall limit access to the as-built drawings to City employees or City contractors with a need to know where the Grantee's facilities are located and shall review the as-built drawings only as necessary to plan City projects, coordinate the use of the rights of way, and to protect the public health and safety.

## **SECTION 16. RESTORATION OF RIGHTS OF WAY**

When Grantee or those acting on its behalf work in or affecting a right of way or City property, the Grantee shall promptly, at its own expense, restore the right of way or other City property, to good order and condition unless otherwise directed by the City.

If weather or other conditions do not permit the complete restoration required by this section, the Grantee shall temporarily restore the affected rights of way or property. Such temporary restoration shall be at the Grantee's sole expense and the Grantee shall promptly undertake and complete the required permanent restoration when the weather or other conditions no longer prevent such permanent restoration. Any corresponding medication to the construction schedule may be subject to approval by the City.

If Grantee fails to restore rights of way or property to good order and condition, the City shall give Grantee written notice and provide the Grantee a reasonable period of time not exceeding fourteen (14) days to restore the rights of way or property. If the work of the Grantee creates a public safety hazard as determined by the City Engineer, Grantee may be required to repair or restore the rights of way within 24 hours. If, after said notice, the Grantee fails to restore the rights of way or property to as good a condition as existed before the work was undertaken, the City shall cause such restoration to be made at the expense of the Grantee.

Grantee or other person acting in its behalf shall use suitable barricades, flags, flagging attendants, lights, flares and other measures as required for the safety of all members of the general public and to prevent injury or damage to any person, vehicle or property by reason of such work in or affecting such rights of way or property.

All such work shall be done in strict compliance with the rules, regulations, ordinances or orders which may be adopted from time to time during the continuance of this franchise by the City Council or City Engineer or as may be otherwise provided by law. The City shall have the right to fix a reasonable time within which such repairs and restoration shall be completed and upon failure of such repairs and restoration being made by Grantee, city shall cause such repairs to be made at the expense of Grantee.



## **SECTION 17. CONSTRUCTION COORDINATION**

Grantee agrees to make a good faith effort to coordinate construction schedules with the City and other uses of City rights of way. Grantee's coordination efforts shall include, but not be limited to:

- a. By January 1 of each year, Grantee shall provide the City with a schedule of its known proposed construction activities in, around, and potentially affecting the public rights of way. Grantee shall inform the City of any additional proposed construction activities as these activities become known and are scheduled.
- b. Meeting with the City once per calendar year upon request of the City Engineer to schedule and coordinate work.
- c. Complying with reasonable directives of the City Engineer or designee on the coordination of construction projects.
- d. Whenever the City shall excavate or perform any work in any right of way or public place, or shall contract for such excavation or work, and that work may disturb Grantee's gas facilities, the City shall, in writing, notify Grantee sufficiently in advance of such contemplated excavation or work to enable Grantee to take such measures as may be deemed necessary to protect its gas facilities from damage and possible inconvenience or injury to the public. In any such case, the Grantee, upon request, shall furnish maps or drawings to the City showing the approximate location of all its gas facilities in the area involved in the excavation or other work. The City shall treat any such map or drawing as confidential, subject to the provisions of state law and the Oregon Public Records Law.

## **SECTION 18. RELOCATION OR REMOVAL**

Grantee shall temporarily or permanently remove, relocate, change or alter the position of any facility within the public right of way when requested to do so in writing by the City Manager or City Engineer, if the removal, relocation, change or alteration is needed because of construction, repair, maintenance or installation of public improvements or other operations of the City within the right of way or is in the public interest. In the event that the removal, relocation, change or alteration is needed to accommodate private development or other private use of the right of way, the developer or other private party requiring the action shall be responsible for the cost of removal, relocation, change or alteration. Construction of public improvements by a private party within the right of way as a condition of City approval shall be considered installation of public improvements of the City if the improvement is not needed to provide service to the private party. In the event of a dispute as to whether the removal, relocation, change or alteration is a public improvement or accommodates private development, the dispute shall be referred to the City Manager, whose decision shall be final and binding. The Grantee shall be under no obligation to remove, relocate, change or alter its facilities to

benefit a private party unless the private party pays a deposit for costs to Grantee. The City shall specify in the written notice the amount of time for removal, relocation, change or alteration. Nothing in this provision prevents the Grantee from reaching an agreement with a private party as to apportionment of the cost of relocation, removal, change or alteration. In the event of an emergency, the Grantee shall take action as needed to resolve the emergency, and the City may use any form of communication to direct the Grantee to take actions in an emergency to protect the public safety, health and welfare.

## **SECTION 19. DISCONTINUANCE OR REMOVAL OF FACILITIES**

When Grantee plants to discontinue any use of any line or facility, the Grantee shall submit a plan for discontinuance to the City. The plan may provide for removal of discontinued facilities or for abandonment in place. The City Engineer shall review the plan and issue an order to Grantee specifying which facilities are to be removed and which may be abandoned in place. The order shall establish a schedule for removal. The Grantee shall remain responsible for all facilities until they are removed.

Within thirty (30) days written notice to do so from the City, or such other reasonable period of time agreed to by the parties, the Grantee shall, at its own expense, remove unauthorized facilities and restore the right of way. The City shall exercise good faith in considering a longer period of time for removing unauthorized facilities, and shall consider the size of the project and the available resources of the Grantee. A facility that the City Engineer has approved to be abandoned in place is not an unauthorized facility. A system or facility is unauthorized under the following circumstances:

- a. The system or facility is outside the scope of authority granted by this agreement.
- b. The system or facility has been abandoned and the City Engineer has not authorized abandonment in place.
- c. The facility is improperly constructed or installed or in a location not permitted by this agreement.

If Grantee fails to remove any facility when required to do so under this agreement, the City may remove the facility and the Grantee shall reimburse the City for the full cost of the removal and any administrative costs incurred by the City in removing the facility and obtaining reimbursement.

## **SECTION 20. TERMINATION**

- A. *By City.* The City may terminate this agreement upon one year's written notice to NW Natural in the event that the City decided to provide natural gas to customers throughout the City.

- B. *By City for Nonpayment.* City may terminate this agreement and NW Natural's franchise if NW Natural fails to pay the franchise fee. The City shall provide 30 days' notice of termination prior to any termination for non-payment. The agreement shall not be terminated if NW Natural pays the full amount, including interest, within 30 days of the notice.
- C. *By City for Cause.* If NW Natural ceases to maintain its facilities and the lack of maintenance increases the risk of personal injury or property damage, the City may terminate this agreement by providing NW Natural 30 days' notice of termination. The agreement shall not be terminated if NW Natural restores its facilities to the satisfaction of the City within 30 days of the notice.

## **SECTION 21. VACATION OF RIGHT OF WAY**

Whenever the City vacates any right of way for the convenience or benefit of any person or government agency or instrumentality, NW Natural's rights under this agreement shall be preserved as to any of its facilities then existing in the right-of-way if reasonably practicable. To the extent NW Natural's rights in the right of way cannot be preserved, City shall attempt to provide an acceptable alternative right of way for the location of NW Natural's facilities. If the City is unable to provide an acceptable alternative location, NW Natural may be responsible for purchasing an easement for its use outside existing City right of way. If NW Natural's facilities must be relocated from a vacated right of way, the petitioners of such vacation, unless in support of a public project, shall bear the costs of relocating the facilities. Upon receipt of a notice of an petition for vacation, NW Natural shall as soon as practicable investigate and advise the City and petitioners in writing whether the facilities must be relocated, the estimated costs of relocation and the time needed for this relocation.

## **SECTION 22. CITY'S RIGHT TO USE NW NATURAL FACILITIES**

NW Natural shall permit City, without charge, to run wires or place equipment in NW Natural trenches for municipal purposes subject to the limitations of pipeline safety requirements. The City shall indemnify and hold NW Natural harmless from loss or damage resulting from the City's wires and equipment.

## **SECTION 23. SCOPE OF RIGHT GRANTED**

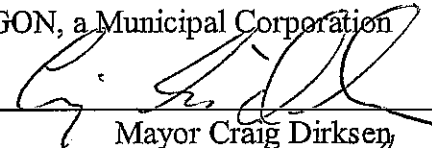
This agreement grants NW Natural the right to place gas transmission facilities and related facilities in the right of way and to operate those facilities. It does not give NW Natural the right to place other resources or facilities in the right of way.

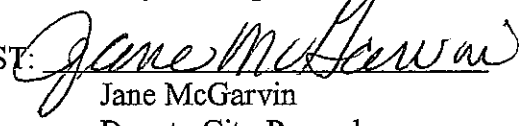
## **SECTION 24. EFFECT OF INVALIDITY OF A PORTION OF THIS AGREEMENT**

If any section, subsection, sentence, clause, phrase, or other portion of this ordinance is, for any reason, held to be invalid or unconstitutional by a court of competent jurisdiction,

all portions of the agreement that are not held to be invalid or unconstitutional shall remain in effect until the contract is terminated or expired. After any declaration of invalidity or unconstitutionality of a portion of this agreement, either party may demand that the other party meet to discuss amending the agreement to adjust the relationship of the parties to conform to their original intent in entering into this agreement. If the parties are unable to agree on a revised franchise agreement within 90 days after a portion of the agreement is found to be invalid or unconstitutional, either party may terminate the agreement on 180 days' notice to the other party.

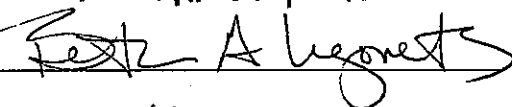
CITY OF TIGARD  
OREGON, a Municipal Corporation

By:   
Mayor Craig Dirksen

ATTEST:   
Jane McGarvin  
Deputy City Recorder

DATE: July 13, 2004

GRANTEE Northwest Natural Gas Company

BY: 

TITLE: Sr VP, Gen Counsel

DATE: 7-28-04

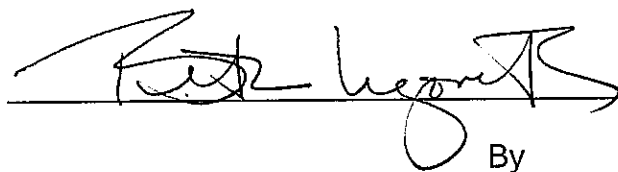
## ACCEPTANCE OF FRANCHISE

Whereas, the City of Tigard, Oregon, under date of July 13, 2004 passed Ordinance No. 04-06, entitled as follows, to wit:

An Ordinance Granting a Non-Exclusive Gas Utility Franchise to NW Natural and Fixing Terms, Conditions and Compensation of Such Utility and Repealing All Ordinances and Parts of Ordinances That Conflict Herewith, and Declaring an Emergency.

Now, Therefore, the undersigned, Northwest Natural, the Grantee named in said Ordinance, does for itself and its successors and assigns accept the terms, conditions and provisions of Ordinance No. 04-06 and agrees to be bound thereby and comply therewith.

In Witness Whereof, Northwest Natural has caused this instrument to be executed by its officers as below subscribed this 28<sup>th</sup> day of July, 2004.

  
By

Received by the City of Tigard

this 5 day of August, 2004.